In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-326

GEORGE N. CHARLTON, JR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

1. Petitioner was removed from his position as a Criminal Investigator, GS-12, of the Internal Revenue Service, on September 29, 1963, in accordance with all procedures applicable to veterans-preference, career civil servants. His removal to "promote the efficiency of the Service" was based upon charges that he had violated the Rules of Conduct for Internal Revenue Service Employees by failing to report a bribery attempt[1] and failing properly to care for government documents.[2] The charges arose out of

[1] Subsection 1941.73 is set out on page 6 of petitioner's "Supplemental Appendix" at note 1.

[2] Subsection 1942.62 of the Rules is reproduced on page 6 of petitioner's Supplemental Appendix at note 2.

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petitioner's conduct during his undercover investigation of "numbers racket" activities in the Pittsburgh area.

In August 1963, petitioner placed wagers on several occasions at the B & M Beer Parlor. On August 13, while at the B & M Beer Parlor, petitioner was approached by an individual named Bill, with whom he had a conversation pertaining to Bill's desire that petitioner, whom Bill knew to be a federal agent, not move against the B & M for its illegal gambling activities. A second contact with Bill took place on the following day, August 14; shortly following this contact, petitioner was taken into custody by IRS agents, who had earlier that day been informed by a Pittsburgh police officer that petitioner was attempting a shakedown of Bill (Pet. App. E, pp. 9–11). An investigation followed, and on August 23 petitioner made the following statement in the office of the United States Attorney and in the presence of two IRS agents:

> I, George N. Charlton, Jr. make the following statement relative to my meetings with a man known to me as Bill at the B & M Beer Parlor 6508 Frankstown Avenue on August 13, 1963 and August 14, 1963.
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> Bill told me on August 13, 1963 that he would assist me in making seven or eight cases if I would give him the slips that I had bought in his place, the B & M. Bill also mentioned the figure $1,000 but I didn't pay any attention to that.
>
> On August 14, 1963 I met Bill and I had the slips and memos regarding my number buys

> in the B & M with me. I was going to give Bill the number slips and memos in exchange for the seven or eight number places that he was going to assist me in getting number buys in the East Liberty District.

Petitioner's discharge was upheld after lengthy administrative proceedings both within IRS and before the Civil Service Commission. These administrative proceedings and the judicial proceedings below are described in considerable detail in the opinion of the district court (Pet. App. E, pp. 5–8, 12–15). No challenge is made to the adequacy or fairness of the administrative review procedures afforded petitioner.

2. There is no warrant for further review. The two lower courts correctly determined that all procedural requirements were followed in discharging petitioner, and that such action was not arbitrary, capricious or an abuse of discretion. Moreover, both courts reviewed the entire administrative record and held that the discharge was supported by substantial evidence.[3] This evidence showed that petitioner was offered a $1,000 bribe on August 13, which he failed to report promptly to his superiors as required by the regulations governing his conduct as an IRS employee—in

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[3] It is doubtful that petitioner was entitled to judicial review as broad as he was accorded. Compare *Seebach* v. *Cullen*, 338 F. 2d 663 (C.A. 9), certiorari denied, 380 U.S. 972; *Brown* v. *Zuckert*, 349 F. 2d 461 (C.A. 7), certiorari denied, 382 U.S. 998; *McTiernan* v. *Gronouski*, 337 F. 2d 31 (C.A. 2), with *Halsey* v. *Nitze*, 390 F. 2d 142 (C.A. 4); *Meehan* v. *Macy*, 392 F. 2d 822 (C.A.D.C.). See especially the concurring opinion of Judge Stahl in the initial remand of this case, *Charlton* v. *United States*, 412 F. 2d 390, 395–400 (C.A. 3).

fact, it appears that he first mentioned this offer ten days later, in connection with his statement of August 23, which is set forth above. Removal on this basis alone was warranted and was well within the discretion allowed the government as his employer.[4]

3. Petitioner attacks the propriety of a discharge based upon the charge of failure to report an attempted bribe as inconsistent with criminal charges accusing him of soliciting a bribe. He cites no authority for the novel proposition that an otherwise valid discharge action should be voided because an "inconsistent" charge was brought in a criminal proceeding. The existence of the criminal prosecution is not relevant to the issues on judicial review of the discharge, which turn on the existence of substantial evidence supporting the infraction charged.[5]

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[4] The district court's recitation of the facts states that the offer of money was made on August 14, shortly before petitioner was taken into custody (Pet. App. E, p. 10). While this was the testimony of petitioner at his administrative hearing (Transcript of Administrative Hearing, pp. 103, 110), it is contrary to his statement of August 23 and to other statements and conduct of petitioner prior to the formal hearing. The hearing officer carefully evaluated this conflict in the evidence and concluded that the offer of money had been made on the 13th and that it was an "unmistakable" bribe offer (Hearing Report, pp. 15–16), a conclusion that was supported by substantial evidence. It is therefore unnecessary to reach the difficult question raised by the district court's apparent conclusion that the bribe consisted of an offer of information regarding other criminal activities (Pet. App. E, p. 16).

[5] Even had petitioner been acquitted in a criminal proceeding of the very accusation that formed the basis for his discharge, this would not invalidate the discharge. See *Finfer* v. *Caplin*, 344 F. 2d 38 (C.A. 2). Moreover, there is no inherent incon-

4. Petitioner also challenges the propriety of the consideration against him of the admissions contained in his statement of August 23, alleging that these admissions were improperly coerced by threats that he would be discharged from his employment if he failed to provide a statement. Neither *Garrity* v. *New Jersey,* 385 U.S. 493, nor *Spevack* v. *Klein,* 385 U.S. 511, the cases cited by petitioner, support this contention. *Garrity* concerns the use in a criminal prosecution of the employee of statements given under threat of loss of job and is inapplicable to civil discharge proceedings. *Spevack* held that a lawyer could not be disbarred for invoking his Fifth Amendment privilege; the plurality opinion specifically stated that it was not reaching the question whether a policeman could be discharged for such a refusal (385 U.S. at 516, n. 3), and it is clear that five justices of the *Spevack* Court were of the view that he could (see concurring opinion of Mr. Justice Fortas, *id.* at 519–520).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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sistency in these charges, since petitioner could have solicited a bribe and, if successful, have received a bribe offer that he failed to report.

[6] There are no facts alleged in the complaint or apparent anywhere in the administrative record to support petitioner's oblique suggestion of racial discrimination (Pet. 9).

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